

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 6 June 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

19th Meeting 2006, Session 2

CONVENER

*Dr Sylvia Jackson (Stirling) (Lab)

DEPUTY CONVENER

Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Mr Adam Ingram (South of Scotland) (SNP)

*Mr Kenneth Macintosh (Eastwood) (Lab)

*Mr Stewart Maxwell (West of Scotland) (SNP)

Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

*Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Mr Ted Brocklebank (Mid Scotland and Fife) (Con)

Maureen Macmillan (Highlands and Islands) (Lab)

Ms Maureen Watt (North East Scotland) (SNP)

*attended

CLERK TO THE COMMITTEE

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 6 June 2006

[THE CONVENER *opened the meeting at 10:30*]

Delegated Powers Scrutiny

Health Board Elections (Scotland) Bill: Stage 1

The Convener (Dr Sylvia Jackson): I welcome members to the 19th meeting in 2006 of the Subordinate Legislation Committee. I have apologies from Gordon Jackson. I remind members to switch off their mobile phones and enter their cards into their consoles.

Item 1 on the agenda is delegated powers scrutiny of a member's bill introduced by Bill Butler. It does not require a delegated powers memorandum, which is a wee bit of an issue, as members will see as we go through the powers. There are only two order-making powers in the bill, which we can consider today. If we have any questions, we can send them to Bill Butler and then invite him to attend our meeting on 27 June to answer any further questions.

Both delegated powers are in section 13, "Orders and ancillary provision", and both are subject to the affirmative procedure. The first is in section 13(1) and is the power to modify schedule 1 to the bill. Members will have seen the legal brief; would you like to raise any points?

Mr Stewart Maxwell (West of Scotland) (SNP): We should ask Bill Butler a general question about the width of the power in section 13(1). Schedule 1 makes detailed provision for the conduct of elections to health boards, so it is a fairly important part of the bill. It would be helpful if Bill Butler could set out his reasoning for putting the power to amend schedule 1 into subordinate legislation.

Mr Kenneth Macintosh (Eastwood) (Lab): The power in section 13(2) will allow ministers to make "incidental, supplemental and consequential" provision and it is also subject to the affirmative procedure. Normally, such a provision would not be subject to the affirmative procedure; it would just be subject to annulment. We might want to draw that to Bill Butler's attention.

Murray Tosh (West of Scotland) (Con): Although, given last week's discussion, we might

want all such provisions to be subject to the affirmative procedure.

The Convener: Yes. I will just go back to the first point on section 13(1), which says:

"The Scottish Ministers may by order modify schedule 1".

I am just giving more detail on what Stewart Maxwell was saying. Because we do not have a delegated powers memorandum, we are not very clear about exactly what that will mean. Further on, the same section says:

"for the purpose of making such further provision".

We might wonder whether the word "such" should be in there, but the main point is that we are unsure what that part of the provision might mean. Perhaps Bill Butler does not know either; he might be leaving it up to the Executive. It would be interesting to hear Bill Butler's thoughts.

Did anyone look at section 9, on the issuing of guidance by the Scottish ministers? Section 9(1) says:

"The Scottish Ministers may issue guidance with respect to the conduct of Health Board elections."

I am wondering about the relationship between section 9 and section 13(1). The guidance concerned might be for the list of administrative matters laid out in section 9(2) and the provision in 13(1) would cover additional modifications that might be made to schedule 1. It would be good to know how the two sections relate to one another and perhaps a bit more about the guidance described in section 9.

Murray Tosh: It might be useful to know what status such guidance would have, if I might use "such" in that context. Local authorities or returning officers might have to have regard to the guidance, or the provision could be looser than that. That could be fleshed out if Bill Butler was able to come to the committee and discuss it with us.

The Convener: The other thing I wondered was whether the word "modify", as it is used in section 13(1), could mean that provisions could be taken out as well as added.

Mr Maxwell: I was just going to make the same point. Does the use of the term "further provision" mean that the schedule can only be added to, or can provisions also be taken out? I am not absolutely clear about that.

Schedule 1 goes into incredible detail over several pages and is a large part of the bill. It seems to me to be the heart of the bill in many ways because it is about the election processes. The question is about the ability of ministers to change that and in what ways. How far does Bill Butler envisage that that power will go? The bill

does not seem to contain any obvious way to curtail such a power; it seems to be pretty wide.

Murray Tosh: Bill Butler might be concerned if he was giving ministers the power to introduce an electoral system analogous to that which is used for local authorities, for example.

Mr Maxwell: He might well be concerned about that.

The Convener: We will inquire about that when we see him.

So, there is an issue about the scope of the powers and how they are envisaged. The only other thing to ask is why Bill Butler thinks that all the powers should be subject to the affirmative procedure and whether he has justification for that. As Murray Tosh said, it might be wise; I do not know, but we could ask Bill Butler a bit more about it.

Kenny Macintosh covered the point about section 13(2), so we have covered all the points raised.

I welcome Adam Ingram, who joined us during that item.

Executive Responses

Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Amendment) (Scotland) Regulations 2006 (SSI 2006/266)

10:37

The Convener: We asked the Executive three questions on the regulations; members will have seen the Executive's response and the legal brief.

The first question was whether the new regulation is *intra vires*. The information is contained in paragraphs 22 to 26 of the legal brief.

Mr Maxwell: I do not think that I understand the Executive's argument, to be honest. It seems to be arguing that it may not publish the notices, as it says in paragraph 22 of our legal brief. However, the regulations clearly say that the notices must be published. The Executive could decide on further amendments or additional parts to the notices, but there is no doubt that they must be published. The Executive seems to be arguing the opposite—that publication could be in doubt—so it could not publish the notices if it so decided. I cannot see how the Executive can argue that. Do we have time to go back to the Executive, or must we report on the regulations?

The Convener: We have time just to report on them.

Mr Maxwell: I certainly do not understand the line of argument that the Executive has taken; we should point it out to the lead committee.

The Convener: To put it in a nutshell, I understand that the legal brief is saying that the enabling act says that the notices must be published, but the regulations seem to be allowing the Executive some exemptions. That is the nub of the Executive's argument and our legal advisers are taking the opposite view.

Murray Tosh: Perhaps there is a general issue that we could add to the agenda for one of our periodic briefings. The legal brief makes the point that an express power would normally be given if it was intended that there should be exemptions from statutory requirements. It would be interesting to test whether that is still policy; we might be able to bring these regulations up in the context of that discussion. I do not see what else we can do with the regulations other than report them.

The Convener: Okay. David McLaren, the clerk, will take a note of your point for our list of points for discussion.

Our second point to the Executive was about defective drafting and that was acknowledged by the Executive. The third point was about the Executive's failure to follow proper legislative practice. In the report that will go to the lead committee and to Parliament, I suggest that we refer to those three points. When drawing attention to the first point, we should include the detail that is in the legal brief, which challenges whether the provision is *intra vires*. That will provide background.

Mr Maxwell: The last paragraph on the regulations in our legal brief says:

"a further drafting point is"

that it

"might also be helpful at the same time to amend regulation 5(1) of the 1987 Regulations to include a pointer to the qualifications".

It would help to point that out in our report.

The Convener: We will add that information. Members will see from the legal brief that the Executive's intention is

"to bring forward an amending instrument as soon as possible."

We will also add that information when we report to the lead committee and to Parliament. That covers everything on the regulations.

Town and Country Planning (Application of Subordinate Legislation to the Crown) (Scotland) Order 2006 (SSI 2006/270)

The Convener: We asked the Executive three questions about the order. The first was about the meaning of one provision, which could have been clearer. The second and third questions concerned defective drafting, which the Executive has acknowledged. I suggest that we draw that to the attention of Parliament and the lead committee. That is fairly clear-cut. Do members have further points?

Mr Maxwell: In its response to our second question, the Executive suggests that readers will be able to understand proposed new regulation 6(4A)(a) of the Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Scotland) Regulations 1987 (SI 1987/1529), even though it

"erroneously refers to 'under regulation 3 or 4' as these words do not appear in regulation 6(1)"

of the 1987 regulations. I am not sure how people will understand what is being referred to.

The Convener: Which paragraph of the legal briefing did you quote?

Mr Maxwell: I quoted paragraph 43.

Murray Tosh: It is suggested that the draftsman followed the corresponding regulations for England. If that is why he understood the provision, although nobody else does, that is disappointing, because the Executive should be alert to the danger of simply basing its work on corresponding regulations for England, especially given the subject matter. Scotland has for a long time had town and country planning legislation with separate procedures, terms and requirements, so the Executive ought to be alert to such danger.

The Convener: That point goes more into paragraph 44 of the legal brief than paragraph 43.

Mr Maxwell: Yes. I mentioned paragraph 43 because I quoted it.

The Convener: We will put in our report the substance of paragraph 44, which covers the point that Murray Tosh raised.

Mr Maxwell: The situation is rather disappointing. A simple check of whether the words "under regulation 3 or 4" were used would have avoided the error. That is quite poor.

Mr Macintosh: We should acknowledge that the Executive says that it is grateful to the committee for highlighting all the mistakes and that it has promised to produce a corrective order.

Murray Tosh: We can welcome that, but it is bizarre that the Executive says that the provision makes sense to it, because the provision clearly does not make sense. It makes sense only if it is read in the context of entirely different regulations that apply to a separate jurisdiction.

The Convener: Perhaps we can reach a compromise.

Mr Maxwell: I doubt it.

The Convener: We will say that the Executive was pleased that we brought the matters to its attention and we will include the information in paragraph 44 of the legal brief. We will also mention that the Executive is to produce corrective legislation as soon as possible, as Ken Macintosh said. The essence of our comments is that the meaning could be clearer in one provision and that there are two instances of defective drafting. Is that agreed?

Members indicated agreement.

Regulation of Care (Applications and Provision of Advice) (Scotland) Amendment Order 2006 (SSI 2006/272)

The Convener: We asked the Executive to explain the purpose of the citation as an enabling power of section 14(3) of the Regulation of Care (Scotland) Act 2001 and to say when it plans to

consolidate the relevant legislation. Do members have comments? The Executive has acknowledged defective drafting of the preamble but says that it is not so defective as to be likely to cast doubts on the order's validity. The Executive's response to the other question was that it would consolidate at the "earliest opportunity".

10:45

Mr Maxwell: We have dealt with several instruments—this is about the third in a row—for which a power to amend secondary legislation would have helped. We see such instruments every week. I accept that defective drafting such as that in the order does not affect an instrument's validity, but it is not helpful to have such mistakes in instruments.

The Convener: The order makes the fourth substantive amendment to the principal order.

Mr Maxwell: Yes.

The Convener: At least the Executive says that it is working on a consolidation order, so it is good that we raised the issue when we did. I see that members have no other comments and that we are happy to report on those matters.

Designation of Institutions of Higher Education (Scotland) Order 2006 (SSI 2006/279)

The Convener: Members will remember that we asked the Executive to explain the removal of the words "The Robert Gordon University" from the Designation of Institutions of Higher Education (Scotland) Order 1992 (SI 1992/1025) when those words do not appear in that order. The Executive explained that the 1992 order was amended by the Designation of Institutions of Higher Education (Scotland) Amendment Order 1993 (SI 1993/424), which replaced the words

"The Robert Gordon Institute of Technology"

with "The Robert Gordon University". The legal brief says that legal advisers are happy with that. Do we agree to report that to the lead committee and the Parliament?

Members *indicated agreement.*

Instruments Subject to Annulment

Sea Fishing (Marking and Identification of Passive Fishing Gear and Beam Trawls) (Scotland) Order 2006 (SSI 2006/284)

Police Pensions Amendment (Scotland) Regulations 2006 (SSI 2006/285)

Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment) 2006 (SSI 2006/295)

10:46

The Convener: No points arise on the instruments and members have no comments.

Instruments Not Laid Before the Parliament

**Crime (International Co-operation) Act
2003 (Commencement No 2) (Scotland)
Order 2006 (SSI 2006/281)**

**Licensing (Scotland) Act 2005
(Commencement No 2 and Transitional
Provisions) Order 2006 (SSI 2006/286)**

10:47

The Convener: No points arise on the orders and members have no comments.

**Disease Control (Interim Measures)
(Scotland) Amendment Order 2006
(SSI 2006/291)**

The Convener: Our legal advisers contacted the Executive about the order because it is ineffective and defective. The Executive has agreed to revoke the order as soon as possible. Do members have comments?

Mr Maxwell: That is a new low—an order that is ineffective and defective. The legal brief suggests that the Executive was trying to fix something that did not need fixing.

The Convener: That is right.

Mr Maxwell: I do not know whether that is positive.

The Convener: On the positive side, it is likely that the Executive was trying to cover all angles. However, the order was not needed. Are members content to report the order to Parliament on the ground that it is to be revoked?

Mr Maxwell: Okay.

The Convener: Let us get away from that quickly.

**Act of Sederunt (Chancery Procedure
Rules) 2006 (SSI 2006/292)**

The Convener: No substantive points arise on the act of sederunt, but we can raise two minor points informally with the Lord President's office. Is that agreed?

Members *indicated agreement.*

**Act of Sederunt (Ordinary Cause Rules)
Amendment (Causes Relating to Articles
81 and 82 of the Treaty Establishing the
European Community) 2006 (SSI 2006/293)**

**Act of Sederunt (Rules of the Court of
Session Amendment No 4) (Fees of
Solicitors) 2006 (SSI 2006/294)**

The Convener: No points arise on the acts of sederunt. Do members have comments?

Mr Maxwell: No.

The Convener: I think that I will be saying what is in my briefing in my sleep.

The committee's next meeting is on Tuesday 13 June and will be chaired by Gordon Jackson. I remind members of the committee's debate in the chamber on Thursday, which begins at 9.15.

Meeting closed at 10:49.

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